

Wells Fargo Bank, NA v Karnes
2017 NY Slip Op 31953(U)
August 4, 2017
Supreme Court, Suffolk County
Docket Number: 13016/2012
Judge: Robert F. Quinlan
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SUPREME COURT - STATE OF NEW YORK
PART 27 PART SUFFOLK COUNTY

PRESENT: HON. ROBERT F. QUINLAN
Justice of the Supreme Court

Motion Date: 07/01/14
Adj. Date: 03/10/16
Motion Sequence.: 001-Mot D
002- MD

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Wells Fargo Bank, NA,

Plaintiff,

-against-

Barbara A. Karnes a/k/a Barbara Karnes; 26 Hale Street Trust, James E. Clark, Esq., as Trustee; CDCLI Funding Corporation and Community Development Corporation of Long Island, Inc.; Teachers Federal Credit Union, and "JOHN DOE", said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

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SHAPIRO, DICARO & BARAK, LLC
Attorneys for Plaintiff
175 Mile Crossing Boulevard
Rochester, NY 14624

BARBARA A. KARNES
Defendant Pro Se
26 Hale Street
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FRANK PERETORE, ESQ.
Attorney for Defendant CDCLI Funding Corporation and Community Development Corporation of Long Island, Inc.
110 Park Street
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COPY

Upon the following papers numbered 1 to 51 read on this application for summary judgment, appointment of a referee and amending the caption; Notice of Motion/Order to Show Cause and supporting papers 1-24 ; Notice of Cross Motion and supporting papers 25-42 ; Replying Affidavits and supporting papers (affirmation in further support of plaintiff's motion and in opposition to defendant's cross-motion) 43-51 ; ~~Other~~ _____; it is,

ORDERED that this motion by Wells Fargo Bank, NA, for summary judgment, dismissing the answer and affirmative defenses of Barbara A. Karnes a/k/a Barbara Karnes, amending the caption, fixing the default of the non-appearing, non-answering defendants, and for an order of reference pursuant to RPAPL § 1321, is granted in part by amending the caption, fixing and setting the default of the non-appearing, non-answering defendants, and granting partial summary judgment pursuant to CPLR 3212 (g) dismissing Barbara A. Karnes' first, second and fourth affirmative defenses, with the only remaining issue of fact to be determined by the court being whether plaintiff has proven compliance with the notice requirements of RPAPL § 1304, raised in Barbara A. Karnes' third affirmative defense; plaintiff's application for an order of reference is denied, subject to renewal; and it is further

ORDERED that defendant Barbara A. Karnes' cross-motion to dismiss is denied; and it is further

ORDERED that plaintiff's application to amend the caption of the action is granted, and the caption shall read as follows:

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Wells Fargo Bank, NA,

Plaintiff,

-against-

Barbara A. Karnes a/k/a Barbara Karnes; 26 Hale
Street Trust, James E. Clark, Esq., as Trustee;
CDCLI Funding Corporation and Community
Development Corporation of Long Island, Inc.;
Teachers Federal Credit Union

Defendant(s).

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plaintiff is to serve a copy of this order upon the Calendar Clerk within 30 days of this date and all further proceeding will be under the amended caption; and it is further

ORDERED that pursuant to CPLR § 2218, a trial limited to the issue of proof of compliance with the notice requirements of RPAPL § 1304 will be held.

To facilitate that, the court directs the following:

1. That all discovery demands relating to the issue of compliance with the mailing requirements of RPAPL §1304 notices must be served within 60 days of the this date.
2. All discovery is to be completed within 150 days of this date.
3. The case will appear for a certification conference on January 10, 2018 at 9:30AM at which time the court will direct the filing of the note of issue and set a pre-trial conference to determine a trial date.

The trial of this matter will remain with this IAS Part 27 and will not be placed in the inventory of the CCP Part.

Upon completion of discovery, and filing of the note of issue, the court will entertain renewed summary judgment motions from the parties, but in no case will such a motion be entertained more than 30 days after the filing of the note of issue.

No other motions may be made without permission of the court, which can be obtained by submission of a letter to the court supporting such application, and a conference in the part on the application.

This is an action to foreclose a mortgage on real property known as 26 Hale Street, Brentwood, Suffolk County, New York ("the property"). On October 9, 1998, the defendant Barbara A. Karnes a/k/a Barbara Karnes ("defendant") executed a note in favor of Wall Street Mortgage Bankers LTD DBA Power Express in the principal sum of \$136,000.00, at the same time giving the lender a mortgage on the property to secure the note. The note was transferred to Wells Fargo Bank, NA ("plaintiff") prior to commencement of this action. Defendant allegedly defaulted on the note and mortgage, failed to cure the default, and plaintiff commenced the instant action on April 26, 2012. Plaintiff alleges service upon defendant by personal service on May 12, 2012. Issue was joined by service of *pro se* defendant's answer, consisting of general denials and four affirmative defenses, sworn to June 1, 2012. Defendant's first affirmative defenses for lack of jurisdiction alleges defendant was not properly served, while her third and fourth affirmative defense claimed plaintiff failed to provide the notices required by RPAPL §§ 1303 and 1304.

Eleven conferences were held in the court's Foreclosure Settlement Conference Part between September 27, 2012 and February 25, 2014. As the action was not settled, the case was released to an IAS Part. Compliance with CPLR § 3408 has been established.

Plaintiff filed the within motion (001) for summary judgment and appointment of a referee, and defendant filed a cross-motion to dismiss (002), both motions were originally returnable July 1, 2014. The matter appeared for conference in IAS Part 24 (Horowitz, J.) on September 3, 2015 after which the motions were marked submitted. Thereafter the action was administratively transferred to the general inventory of Part 27 and the motion adjourned to March 10, 2016.

Plaintiff moves for summary judgment dismissing the affirmative defenses of defendant, for default judgment against non-appearing parties, for appointment of a referee, and to amend the caption. In deciding the motion the court has considered plaintiff's submissions in support consisting of its attorneys' affirmations, the affidavit in support of summary judgment of plaintiff's vice president ("Sims affidavit"), and attached exhibits. Defendant cross-moves to dismiss alleging, *inter alia*, the summons and complaint were not properly served upon her. The court has considered defendant's affidavit and exhibits submitted in support of her cross-motion. Plaintiff's affirmation in further support of its motion and in opposition to defendant's cross-motion is also considered.¹

JURISDICTION

Pursuant to CPLR 3211 [e] an objection that the summons and complaint was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading. Because defendant did not move to dismiss the complaint for lack of personal jurisdiction on the grounds of improper service within 60 days of serving her answer (by July 31, 2012), she has waived the defense (*see JP Morgan Chase Bank v Munoz*, 85 AD3d 1124 [2d Dept 2011]; *Federici v Metropolis Night Club, Inc.*, 48 AD3d 741 [2d Dept 2008]; *Generation Mtge. Co. v Medina*, 138 AD3d 688 [2d Dept 2016]). While CPLR 3211 [e] permits the court to excuse a defendant's failure to timely move for dismissal, defendant did not demonstrate any undue hardship to justify an extension. Defendant's broad and conclusory allegations including that

¹Correspondence from *pro se* defendant dated August 26, 2015, September 8, 2015 and January 18, 2016, has been received by the court but was not considered.

plaintiff filed this action prematurely, that service was fraudulent, that plaintiff participated in 1.5 years of settlement conferences with no intent of complying, and that plaintiff's motion is intended to keep defendant in legal maneuvering to fraudulently acquire the property, are insufficient to demonstrate the requisite undue hardship to justify an extension of defendant's time to move to dismiss based on improper service (see *Woleben v Sutaria*, 34 AD3d 1295 [2d Dept 2006]; *B.N. Realty Associates v Lichtenstein*, 21 AD3d 793 [2d Dept 2005]). Further, defendant's allegations that she advised plaintiff, as well as the court attorney referee present during the many settlement conferences, that she contested service, also do not amount to undue hardship. Defendant's cross-motion is denied and her first affirmative defense is dismissed.

The failure to raise and support pleaded affirmative defenses in opposition to a motion for summary judgment renders them abandoned and subject to dismissal (see *Kuehne & Nagel Inc. v Baiden*, 36 NY2d 539 [1975]; *Kronick v L. P. Therault Co., Inc.*, 70 AD3d 648 [2d Dept 2010]; *New York Commercial Bank v. J. Realty F. Rockaway, Ltd.*, 108 AD3d 756 [2d Dept 2013]; *Starkman v. City of Long Beach*, 106 AD3d 1076 [2d Dept 2013]; *Katz v Miller*, 120 AD3d 768 [2d Dept 2014]). Defendant's second affirmative defense is dismissed. Defendant's third and fourth affirmative defenses allege plaintiff's failure to comply with the notices required by RPAPL §§ 1303 and 1304, they are considered below.

SUMMARY JUDGMENT

Entitlement to summary judgment in favor of a foreclosing plaintiff is established, prima facie, by plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (see *Wells Fargo Bank, N.A. v. DeSouza*, 126 AD3d 965 [2d Dept 2015]; *Wells Fargo, NA v Erobobo*, 127 AD3d 1176 [2d Dept 2015]; *Wells Fargo Bank, NA v Morgan*, 139 AD3d 1046 [2d Dept 2016]). If established that proof submitted in evidentiary form, plaintiff has demonstrated its entitlement to summary judgment (CPLR 3212; RPAPL § 1321; see *Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558 [2d Dept 1997]). The burden then shifts to defendants to demonstrate the existence of a triable issue of fact as to a bona fide defense (see *Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882 [2d Dept 2010], *Zanfini v Chandler*, 79 AD3d 1031 [2d Dept 2010]; *Citibank, NA v Van Brunt Properties, LCC*, 95 AD3d 1158 [2d Dept 2012]). Defendants then must produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact (see *Washington Mut. Bank v Valencia*, 92 AD3d 774 [2d Dept 2012]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Defendants' answer and affirmative defenses alone are insufficient to defeat plaintiff's motion (see, *Flagstar Bank v Bellafore*, 94 AD3d 1044 [2d Dept 2012]). In deciding the motion the court is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (see *Vega v Restani Corp.*, 18 NY3d 499 [2012]).

RPAPL § 1303

Defendant's fourth affirmative defense alleging plaintiff's failure to comply with the notice requirements of RPAPL § 1303 is dismissed. Plaintiff provided copies of the affidavits of its process server showing service of the RPAPL § 1303 notice upon defendant by personal service and by mail, as well as copies of the notice served (see Plaintiff's Exhibit "E"). Defendant's submission raise no arguments as to the adequacy of the notice, nor provides sufficient facts to rebut this service. Just as with service of a summons and complaint, defendants' bare and unsubstantiated denial of receipt is

insufficient to rebut the presumption of service created by the affidavit of service which was provided to the court (*see Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989 [2d Dept 2010]; *U. S. Bank Natl. v. Tate*, 102 AD3d 859 [2d Dept 2013]).

RPAPL § 1304

Where a defendant has properly asserts non-compliance with the notice requirements of RPAPL §1304 as a defense plaintiff must adduce due proof that the pre-action foreclosure 90 day notice requirements have been satisfied (*see Zarabi v. Movahedian*, 136 AD3d 895 [2d Dept 2016]; *Cenlar FSB v. Weisz*, 136 AD3d 855 [2d Dept 2016]; *Citimortgage v. Espinal*, 134 AD3d 876 [2d Dept 2016]). Plaintiff has failed to prove mailing of the notices required by RPAPL § 1304, therefore defendant's third affirmative defense cannot be dismissed (*see Cenlar, supra*; *Bank of N.Y. Mellon v Aquino*, 131 AD3d 1186 [2d Dept 2015]; *Wells Fargo Bank, NA v Burke*, 125 AD3d 765 [2d Dept 2015]; *Hudson City Sav. Bank v DePasquale*, 113 AD3d 595 [2d Dept 2014]). The affidavit of plaintiff's vice president is insufficient to prove the mailing, as it merely states that the affiant reviewed the records which show that the notices were mailed by regular and certified mail (*see Sims affidavit at ¶ 5*).

Even if an affiant establishes the ability to testify as to business records pursuant to CPLR § 4518, if the affiant merely states a review of the records establishes the notices were mailed by regular and certified mail on a certain date, they are unsubstantiated, conclusory and insufficient to prove the mailing required by RPAPL § 1304 (*see JPMorgan Chase Bank, N.A. v Kutch*, 142 AD3d 536 [2d Dept 2016]; *Cenlar FSB v Censor*, 139 AD3d 781 [2d Dept 2016]). Unsubstantiated and conclusory statements in the affidavit along with dated copies of the notice, are insufficient to prove that the notices were properly mailed (*see HSBC Mtge. Corp. v Gerber*, 100 AD3d 966 [2d Dept 2012]; *Citimortgage, Inc. v Espinal*, 134 AD3d 876 [2d Dept 2015]; *U. S. Bank, N.A. v Carey*, 137 AD3d 894 [2d Dept 2016]). To establish mailing, plaintiff may provide proof of actual mailing or a description of its office's practice and procedure for mailing (*see New York & Presbyt. Hosp. v Allstate Ins. Co.* (29 AD3d 547 [2d Dept 2006]; *Citibank, N.A. v Wood*, 150 AD3d 813 [2d Dept 2017]). Proof of mailing of the notices can also be established by an affidavit of mailing (*see JPMorgan Chase Bank, N.A. v Schott*, 130 AD3d 875 [2d Dept 2015]; *Wells Fargo v Moza*, 129 AD3d 946 [2d Dept 2015]) or through business records that detail a standard of office practice or procedure designed to ensure that notices were properly addressed and mailed (*see Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2d Dept 2001]), after which a presumption of receipt arises (*see Vivane Etienne Med. Care, P.C. v Country Wide Ins. Co.*, 25 NY3d 498 [2015]; *Residential Holding Corp., v Scottsdale Ins. Co.*, *supra*). Affiant must show his/her familiarity with office practices and procedures to establish those practices and procedures to insure proper addressing and mailing (*see CitiMortgage, Inc v Papas*, 147 AD3d 900 [2d Dept 2017]; *Citibank, N.A. v Wood*, *supra*; *Wells Fargo Bank, NA v Trupia*, 150 AD3d 1049 [2d Dept 2017]). The affidavit here fails to provide such proof.

PLAINTIFF GRANTED PARTIAL SUMMARY JUDGMENT

Failing to prove compliance with RPAPL § 1304, plaintiff failed to establish its prima facie entitlement to judgment as a matter of law requiring denial of its motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Plaintiff's is therefore granted partial summary judgment, pursuant to CPLR 3212 (g), dismissing

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defendants' first, second and fourth affirmative defenses. The only remaining issue of fact is plaintiff's proof of compliance with the mailing requirements relevant to the notices required by RPAPL § 1304. The court sets the action down for trial, in this part, pursuant to CPLR § 2218, which shall be limited to the proof of that issue.

Plaintiff's application to amend the caption to remove the "John Doe" defendant is granted.

The default of the non-appearing, non-answering defendants are fixed and set (*see U.S. Bank N.A. v Wolherman*, 135 AD3d 850 [2d Dept 2016]; *HSBC USA, N.A. v Alexander*, 124 AD3d 838 [2d Dept 2015]; *U.S. Bank, N.A. v Razon*, 115 AD3d 739 [2d Dept 2014]).

Plaintiff's application for the appointment of a referee pursuant to RPAPL § 1321 is denied, without prejudice to renew. Plaintiff's proposed order has been marked "not signed."

This constitutes the Order and decision of the Court.

DATED: August 4, 2017


HON. ROBERT F. QUINLAN
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION